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No. 97-1267

In the Supreme Court of the United States

OCTOBER TERM, 1997

PROFESSIONAL PILOTS FEDERATION, ET AL.,
PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, limits the Federal Aviation Administration's authority to adopt the "Age 60 Rule," 14 C.F.R. 121.383(c), an air transportation safety standard that prohibits persons sixty years of age or older from serving as pilots of most commercial aircraft.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	10
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Advocates for Highway & Auto Safety v. *Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994)	5
Air Line Pilots Ass'n, Int'l v. *Quesada*, 276 F.2d 892 (2d Cir. 1960)	3
Aman v. *FAA*, 856 F.2d 946 (7th Cir. 1988)	5, 18, 19
Baker v. *FAA*, 917 F.2d 318 (7th Cir. 1990), cert. denied, 499 U.S. 936 (1991)	5, 18, 19
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	16
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962)	14, 15
Coupé v. *Federal Express Corp.*, 121 F.3d 1022 (6th Cir. 1997), cert. denied, No. 97-1012 (Mar. 23, 1998)	13, 14
EEOC v. *American Airlines, Inc.* 48 F.3d 164 (5th Cir. 1995)	18
EEOC v. *Boeing Co.*, 843 F.2d 1213 (9th Cir.), cert. denied, 488 U.S. 889 (1988)	17
Gray v. *FAA*, 594 F.2d 793 (10th Cir. 1979)	5
Keating v. *FAA*, 610 F.2d 611 (9th Cir. 1979)	5
Massachusetts Bd. of Retirement v. *Murgia*, 427 U.S. 307 (1976)	3, 4
O'Donnell v. *Shaffer*, 491 F.2d 59 (D.C. Cir. 1974)	5
Rombough v. *FAA*, 594 F.2d 893 (2d Cir. 1979)	5
Starr v. *FAA*, 589 F.2d 307 (7th Cir. 1978)	5

Cases—Continued: Page

Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985) 18
Tuohy v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) 18
Western Air Lines, Inc. v. *Criswell*, 472 U.S. 400 (1985) 11, 12, 13, 14
Williams v. *Hughes Helicopters, Inc.*, 806 F.2d 1387 (9th Cir. 1986) 18

Statutes, rule and regulations:

Administrative Procedure Act, 5 U.S.C. 706(2)(A) 9, 15
Act of Dec. 29, 1979, Pub. L. No. 96-171, 93 Stat. 1285 3
Age Discriminiation in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 7, 10
29 U.S.C. 623(a) 10
29 U.S.C. 623(a)(1) 8
29 U.S.C. 623(f)(1) 9, 12
29 U.S.C. 794(a) 10
Department of Transportation and Related Agencies Appropriations Act of 1997, Pub. L. No. 104-205, § 345, 110 Stat. 2976 6
26 U.S.C. 415(b)(9) 6
49 U.S.C. 44701(a)(4) 2
49 U.S.C. 44701(b)(1) 2
49 U.S.C. 44701(c) 2
49 U.S.C. 4701(d)(1)(A) 2, 7
Sup. Ct. R. 14.1(a) 16
14 C.F.R. 121.383(c) 2
29 C.F.R. 1625.6(b) 12

Miscellaneous:

Age Discrimination and the FAA Age 60 Rule: Hearing Before the House Select Comm. on Aging, 99th Cong., 1st Sess. (Comm. Pub. No. 533, 1985) 5
24 Fed. Reg. (1959):
p. 5248 2
p. 9767 2

Miscellaneous—Continued: Page

47 Fed. Reg. (1982):
p. 29,782 4
pp. 29,783-29,784 4
49 Fed. Reg. (1984):
p. 14,692 ..... 4, 5
p. 14,693 4
58 Fed. Reg. 21,336 (1993) 6
60 Fed. Reg. (1995):
p. 65,832 8
p. 65,843 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a39) is reported at 118 F.3d 758. The decision of the Federal Aviation Administration (Pet. App. a40-a76) is published at 60 Fed. Reg. 65,977.

JURISDICTION

The court of appeals entered its judgment on July 15, 1997. A petition for rehearing was denied on November 5, 1997. Pet. App. a77. The petition for a writ of certiorari was filed on February 3, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has given the Federal Aviation Administration (FAA) broad authority to prescribe "regulations in the interest of safety for the maxi-

mum hours or periods of service of airmen and other employees of air carriers" and to set safety standards for air carriers. 49 U.S.C. 44701(a)(4) and (b)(1). The agency must regulate "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." 49 U.S.C. 44701(c). Moreover, when prescribing air safety standards, the FAA must consider "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. 44701(d)(1)(A).

The "Age 60 Rule," which prohibits air carriers from using, and any person from serving as, a pilot in most commercial operations "if that person has reached his 60th birthday," is a long-standing safety standard. 14 C.F.R. 121.383(c). The FAA promulgated the rule in 1959 because of its concern about the danger to the public if the pilot of a large commercial aircraft were suddenly to become incapacitated. See 24 Fed. Reg. 5248 (1959). In that rulemaking, the agency found "that there is a progressive deterioration of certain important [physiological] and psychological functions with age, that significant medical defects attributable to this degenerative process occur at an increasing rate as age increases, and that sudden incapacity due to such medical defects becomes significantly more frequent in any group reaching age 60." 24 Fed. Reg. 9767 (1959). The agency also found that incidents of sudden incapacity were difficult to predict, and that the ability to perform the type of highly skilled tasks required of pilots was "even less susceptible to precise measurement." *Ibid.*

The FAA therefore determined that the Age 60 Rule, which precludes persons from piloting large

commercial aircraft from that age onward (but not from serving in other positions, such as flight engineer), was necessary to protect the public safety. The rule was challenged immediately and upheld as a reasonable exercise of the FAA's mandate to protect public safety. *Air Line Pilots Ass'n, Int'l* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960).

2. The FAA and others have repeatedly reexamined the rule. In 1979, Congress directed the National Institutes of Health, in consultation with the Secretary of Transportation, to conduct a study of the Age 60 Rule. Act of Dec. 29, 1979, Pub. L. No. 96-171, 93 Stat. 1285. The National Institute on Aging (NIA) was assigned responsibility for the study and issued its report in 1981. Although the NIA found "no convincing medical evidence to support age 60, or any other *specific* age, for mandatory pilot retirement," the NIA acknowledged the "abundant and persuasive evidence that, among pilots as well as others, disease, disability and death rates rise increasingly steeply during each half-decade beyond the age of 50." C.A. App. 159. The report added: "Aircraft accidents attributed to acute or subtle incapacitation from disorders associated with aging have occurred in the United States and elsewhere * * *. The available actuarial and epidemiological data suggest that the probability of such accidents will increase if the age limit is increased." *Id.* at 161. The NIA could not identify, however, any means of singling out those pilots who would pose the greatest hazard. *Id.* at 158, 164.[1] The NIA therefore made three recommenda-

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[1] In *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 315-316 (1976), this Court recognized that "physical ability generally declines with age" and rejected an equal protection

tions: (1) retention of the Age 60 Rule, (2) collection of medical and performance data necessary to consider relaxation of the rule, and (3) extension of the rule to all for-hire passenger operations, as the National Transportation Safety Board (NTSB) had urged. *Id.* at 158.

In response to the NIA report, the FAA issued an advance notice of proposed rulemaking, seeking public input on the recommendation to collect more data on the effects of aging on pilot performance. 47 Fed. Reg. 29,782 (1982). The FAA proposed an eight-year experiment, using a select group of volunteer pilots who would continue flying until age 62 and would be subject to extensive quarterly testing. *Id.* at 29,783-29,784. After considering hundreds of comments, however, the FAA withdrew the proposal. 49 Fed. Reg. 14,692 (1984). Among other things, the agency found no sufficient means to collect performance data, from a statistically valid sample, under conditions of stress and fatigue. *Id.* at 14,693. Nor were there tests "that can adequately determine which individual pilots are subject to incapacitation" due to cardiovascular, cerebrovascular, or other disease. *Ibid.* The FAA therefore withdrew the proposal "because, in the absence of validly selective tests, there are not sufficient means for collecting quantitative medical and performance data on airline pilots over age 60 under conditions of actual operational stress and fatigue that do not introduce an unacceptable safety

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challenge to a State's imposition of a mandatory retirement age for police officers, rather than use of individualized testing. The dissent, as well, noted that at some point "medical examinations lose their predictive ability" and cited the Age 60 Rule favorably in that connection. *Id.* at 326 n.6 (Marshall, J., dissenting).

risk." *Id.* at 14,692. Cf. *Advocates for Highway & Auto Safety* v. *Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994) (striking down temporary program, in which waivers of long-standing safety standard were granted to truckers with impaired vision in order to collect data for potential amendment of vision standard).

The FAA has also reviewed the Age 60 Rule on a number of occasions in response to petitions for rulemaking or exemptions. In each instance, the agency concluded that neither repeal of the rule nor an exemption from it was warranted. Without exception, the courts have upheld those determinations. See *O'Donnell* v. *Shaffer*, 491 F.2d 59 (D.C. Cir. 1974); *Starr* v. *FAA*, 589 F.2d 307 (7th Cir. 1978); *Gray* v. *FAA*, 594 F.2d 793 (10th Cir. 1979); *Rombough* v. *FAA*, 594 F.2d 893 (2d Cir. 1979); *Keating* v. *FAA*, 610 F.2d 611 (9th Cir. 1979); *Baker* v. *FAA*, 917 F.2d 318 (7th Cir. 1990), cert. denied, 499 U.S. 936 (1991).[2]

The Age 60 Rule has attracted Congress's attention from time to time as well. For example, Congress held hearings on the rule in 1985, but did not amend or repeal the rule legislatively. See *Age Discrimination and the FAA Age 60 Rule: Hearing Before the House Select Comm. on Aging*, 99th Cong., 1st Sess. (Comm. Pub. No. 533, 1985). Congress has

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[2] In *Aman* v. *FAA*, 856 F.2d 946 (7th Cir. 1988), the court of appeals reviewed several exemption denials. Although it upheld the FAA's conclusion that the petitioners in that case had not shown an effective protocol to screen out all increased risk of incapacitation, it remanded for a more detailed response to petitioners' claim that experience offsets undetected physical losses. *Id.* at 957. After the FAA responded, the matter returned to the court in *Baker*, which upheld the agency's denial of the exemptions.

enacted a provision in the Internal Revenue Code that gives special tax treatment to pilots affected by the rule. 26 U.S.C. 415(b)(9). And recently, Congress prohibited the NTSB from expending any funds to study the performance of pilots over age 60. Department of Transportation and Related Agencies Appropriations Act of 1997, Pub. L. No. 104-205, § 345, 110 Stat. 2976.

3. The FAA's most recent review of the rule began in 1990, when it contracted for a study correlating accident data with pilot age and flying time. The final report, known as the "Hilton Study," was issued in 1993. Although the accident data examined in the Hilton Study revealed "no hint of an increase in accident rate for pilots of scheduled air carriers as they neared their 60th birthday," the study's authors warned that the question whether the retirement age should be increased "must be answered very conservatively because of the possibility of catastrophic results." C.A. App. 144. The study suggested, however, that the retirement age for pilots might "cautiously" be increased to 63. *Id.* at 145.

Soon after the Hilton Study was issued, the FAA invited the public to comment on it and to participate in a meeting to consider increasing the maximum age for pilots and other issues related to the Age 60 Rule. 58 Fed. Reg. 21,336 (1993). During that process, petitioner Professional Pilots Federation submitted a petition for rulemaking, in which it asked the FAA to repeal the Age 60 Rule, and petitioner William T. Reiners, III, requested an exemption. After considering an extensive record, the FAA concluded that the "concerns regarding aging pilots and underlying the original rule have not been shown to be invalid or misplaced." Pet. App. a53. It therefore decided not to

initiate a rulemaking to change or repeal the rule and declined to grant any pending petitions for exemption or rulemaking. *Id.* at a52, a63, a76.

The agency acknowledged that, in the years since the rule was adopted, "there has been remarkable progress in medicine, particularly in the ability to evaluate cardiovascular fitness and in the diagnosis and treatment of cardiac and cerebrovascular illness." Pet. App. a53. Nonetheless, the frequency of cardiovascular disease still rises with age, especially between ages 55 and 65, and remains the most frequent cause of death in pilots and the general population. *Ibid.* Most problematic, however, are age-related impairments of cognitive function (*e.g.*, attention span, language ability, visuospatial skills, memory) and the increasing incidence of dementia, which may be characterized by subtle changes and are more difficult to detect and assess. *Id.* at a54-a57. Given the FAA's statutory mandate to prescribe regulations that will assure "the highest possible degree of safety," 49 U.S.C. 44701(d)(1)(A), and the lack of any proven, effective means of detecting or predicting age-related impairment of cognitive function, the FAA concluded that the Age 60 Rule effectively limits "the increasing, unpredictable danger associated with aging" and "provides additional confidence in air transportation safety." Pet. App. a65.

Addressing comments contending that the rule does not comply with the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, the FAA agreed that "limitations based on age are to be avoided if possible," but stressed that "safety in air transportation is paramount." Pet. App. a72. Given the potentially severe consequences of a pilot's subtle or sudden incapacitation and the current lack

of any acceptable way to screen an individual pilot for age-related risks, the agency concluded that "at this time safety requires the Age 60 Rule to remain unchanged." *Ibid.*

In a companion proceeding concerned with commuter airlines, the FAA extended the Age 60 Rule and other safety standards previously applied only to large commercial airlines to commuter operations, as the NTSB had recommended. The agency found that, because "rules designed to enhance the performance of pilots are among the most valuable in reducing the number of accidents," the Age 60 Rule will provide "an additional measure of safety by reducing the risk that age-related degradation will affect pilot performance." 60 Fed. Reg. 65,832, 65,843 (1995).

4. Petitioners sought judicial review of the FAA's decisions not to commence a rulemaking to repeal the Age 60 Rule and to extend the rule to commuter operations. They argued that the rule is a "direct violation" of the ADEA and is unsupported by the record and therefore arbitrary.

The court of appeals unanimously rejected petitioners' ADEA argument, agreeing with the FAA that, by its terms, the ADEA, 29 U.S.C. 623(a)(1), prohibits only an "employer" from discriminating on the basis of age in employment decisions: "Nothing in the Act can plausibly be read to restrict the FAA from making age a criterion for employment when its [*sic*] acts in its capacity as the guarantor of public safety in the air." Pet. App. a8. The court explained further that, "[i]f the Congress intends to limit the means available to the FAA in its pursuit of air safety, we trust it will say so rather than leave the matter to the courts to infer." *Id.* at a8-a9. Because the ADEA thus does not limit the FAA's authority as a safety regulator, the

court found it unnecessary to decide whether the Age 60 Rule is a "bona fide occupational qualification" (BFOQ) under 29 U.S.C. 623(f)(1). Pet. App. a9; see *id.* at a26.

The court also unanimously agreed that the FAA's decision not to institute a rulemaking to repeal the rule should be reviewed under the usual "arbitrary and capricious" standard of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A). Pet. App. a10, a26 n.2. The panel majority held that, under that standard, none of petitioners' numerous objections had merit. For example, with respect to petitioners' claim that individualized testing could screen out pilots at risk from age-related impairment, the court stated that the "FAA explained that even state-of-the-art testing cannot screen out potentially risky pilots." *Id.* at a13. To the extent that data not presented to the agency were alleged to contradict that finding, the court reasoned that "the FAA simply cannot be faulted for failing to explain away data that are not part of the record." *Ibid.*

The court also found that the FAA's policy of allowing younger pilots with known medical problems to continue flying, where such conditions can be monitored, does not undermine the Age 60 Rule, because "the subtler forms of physical and mental decline that may accompany aging often cannot be detected, let alone monitored or controlled." Pet. App. a18. The court held further that the FAA's decision to hold for-hire common carriers of passengers and cargo to a higher safety standard than other forms of air commerce (such as corporate aircraft and unscheduled air taxi services) is reasonable and based on distinctions set forth in federal aviation law. *Id.* at a18-a20.

The dissent maintained that the FAA had not "provide[d] a reasoned explanation for its decision to retain the Age 60 Rule." Pet. App. a39. Despite the agency's solicitation and receipt of substantial public input on the matter, the dissent stated that it was "arbitrary" for the FAA to "refus[e] to try and obtain the evidence it claims is necessary to rescind the rule." *Id.* at a35.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Furthermore, the FAA's Age 60 Rule does not conflict with the Age Discrimination in Employment Act of 1967 (ADEA) or the regulations of the Equal Employment Opportunity Commission (EEOC). Accordingly, the petition for a writ of certiorari should be denied.

1. As the court of appeals unanimously held and petitioners concede (Pet. 18), the ADEA, by its terms, proscribes age discrimination only by "an employer." The ADEA therefore does not limit the FAA's authority as safety regulator of the airline industry. 29 U.S.C. 623(a); Pet. App. a8-a9. When Congress intends that civil rights legislation apply to federal agencies in their programmatic activities, it so provides in unmistakable language that is not present in the ADEA. See, *e.g.*, 29 U.S.C. 794(a) ("[n]o otherwise qualified individual" shall be subject to discrimination on the basis of disability "under any program or activity conducted by any Executive agency" of the federal government). "Nothing in the [ADEA] can plausibly be read to restrict the FAA from making age a criterion for employment when [it] acts in its capacity as the guarantor of public safety in the air."

Pet. App. a8. The court of appeals therefore correctly ruled that "[t]he general prohibition of the ADEA, *addressed as it is to employers*, should not be read by mere implication to override the specific grants of authority to the FAA" to regulate air carriers to promote air safety. *Ibid.* (emphasis added).

Contrary to petitioners' claim (Pet. 14), the court of appeals did not depart from the principle of statutory construction that a specific statute generally takes precedence over a more general one. Nor did the court ignore (Pet. 17) the principle that a court should endeavor to give effect to each of two statutes that conflict. Here, the ADEA and federal aviation safety laws are simply addressed to different matters, and the court thus properly concluded that there is no basis for extending the ADEA beyond the particular subject matter to which it is plainly addressed—*i.e.*, age discrimination by "an employer."

2. Petitioners mistakenly argue (Pet. 13-18) that the court of appeals' decision conflicts with *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985), and relieves an airline employer of the burden of establishing that age is a bona fide occupational qualification (BFOQ), within the meaning of the ADEA and EEOC regulations, for a particular job. Having determined that the ADEA does not apply to the FAA's activities as a safety regulator, the court of appeals correctly found no need to decide whether the Age 60 Rule is a BFOQ. Pet. App. a9, a26. The decision of the court of appeals therefore does not conflict with the EEOC's BFOQ regulation or with *Criswell*, which upheld that regulation.

The ADEA allows age-based discrimination "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the

particular business." 29 U.S.C. 623(f)(1). The EEOC, which has responsibility for enforcing the ADEA, has issued a regulation explaining what "[a]n employer" must show in order to establish a BFOQ defense to a claim of age discrimination. The employer must establish that "(1) the age limit is reasonably necessary to the essence of the business, and either (2) * * * all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) * * * some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age." 29 C.F.R. 1625.6(b). The regulation also provides that, if public safety is a goal, "the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." *Ibid.*

In *Criswell*, 472 U.S. at 416-423, the Court endorsed the EEOC's regulation, ruling that an employer has the burden of proving that an age limit is a BFOQ reasonably necessary for the conduct of its business, even where there are public safety implications, and that such determinations are to be made on a case-by-case basis. The Court also held that an airline had not established a BFOQ defense for the mandatory retirement age of 60 that the airline—not the FAA—had imposed on its flight engineers. The *Criswell* Court never suggested that the FAA's Age 60 Rule for commercial pilots violates the ADEA or does not constitute a BFOQ. Rather, *Criswell* distinguished the airline's managerial decision to require flight engineers to retire at age 60 from the FAA's mandate that pilots do so, on the ground that "the qualifications for a flight engineer [are] less rigorous than those required for a pilot." *Id.* at 418. The Court

further noted that the FAA's rule was "adopted for safety reasons" (*ibid.*) by the "agency with primary responsibility for maintaining airline safety." *Id.* at 423.

Inasmuch as the court of appeals here did not address whether the Age 60 Rule is a BFOQ, its decision cannot conflict with the EEOC's regulation or *Criswell*. Another court of appeals, however, has recently upheld an air carrier's claim that the Age 60 Rule is a BFOQ under the ADEA and the EEOC's regulation.

In *Coupé* v. *Federal Express Corp.*, 121 F.3d 1022 (6th Cir. 1997), cert. denied, No. 97-1012 (March 23, 1998), a pilot subject to the Age 60 Rule faced the choice of retirement or training for a flight engineer position. The EEOC dismissed his age discrimination complaint, noting that his employer "was acting 'pursuant to Federal Air Regulations.'" *Id.* at 1024. In federal court, the employer defended its action on the ground that the Age 60 Rule is a BFOQ for commercial pilots, and both the district court and court of appeals agreed. The court of appeals found that, although the FAA has never purported to establish the Age 60 Rule as a BFOQ, it "performed the same sort of analysis that a court would undertake in determining the legitimacy of a BFOQ defense under the framework established by the EEOC regulation." *Id.* at 1024-1025. The court then held that "[t]he employer's burden to make a particularized factual showing in support of its BFOQ defense is satisfied by demonstrating the existence of an age-based federal agency rule by which the employer is bound—at least where, as here, the rule has been adopted on grounds that could support a BFOQ defense had the age limit been adopted by the employer voluntarily."

Id. at 1026. The court added that it does not believe that the ADEA requires an employer "to second-guess the very agency established by Congress to regulate it." *Ibid.*

Under the Sixth Circuit's decision, an air carrier can comply with both the FAA's safety-based Age 60 Rule and the ADEA by showing that the rule's retirement age limit for most commercial pilots is a BFOQ. The Age 60 Rule is also consistent with *Criswell*, which recognized that, "[w]hen an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business." 472 U.S. at 419.

3. Petitioners' argument (Pet. 19-22) that the court of appeals applied "an insufficiently rigorous standard of review" to the FAA's decision because that decision assertedly conflicts with the jurisdiction and policies of another federal agency is mistaken. As we have shown, the Age 60 Rule does not conflict with the ADEA or with the EEOC's regulations and jurisdiction. Thus, cases such as *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 173 (1962)—in which the Court cautioned that one federal agency should not "trench upon [an]other's jurisdiction"—are inapposite.[3] In any event, *Burling-*

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[3] Petitioners imply (Pet. 19-20) that the FAA both ignored the ADEA and claimed that it was entitled to deference for its interpretation of that statute. Neither suggestion is correct. First, in announcing its decision not to initiate a rulemaking to repeal the Age 60 Rule, the FAA explicitly addressed petitioners' comments that the rule does not comply with the ADEA. Although the FAA agreed that "limitations based on

ton Truck Lines did not hold that the standard of review prescribed by the Administrative Procedure Act (APA) is superseded when agency action implicates more than one statute. In fact, the Court applied the APA in *Burlington Truck Lines* in holding that the order of the Interstate Commerce Commission could not stand because it contained "no findings and no analysis." *Id.* at 167 & n.15. It is thus not surprising that neither the majority nor the dissent in the court of appeals endorsed petitioners' "heightened standard" (Pet. 20). See Pet. App. a10, a26 n.2.

Under the APA, the court of appeals was obliged to determine if the FAA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). The court of appeals applied that standard to the FAA's decision not to initiate a rulemaking to repeal the Age 60 Rule and also held that the ADEA does not limit the FAA's authority as a safety regulator. Pet. App. a8-a9. The court thus concluded that the FAA's decision is "in accordance with law."[4]

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age are to be avoided if possible," it also stressed that "safety in air transportation is paramount." Pet. App. a72. The agency explained further that no commenter in the proceeding had provided it with any existing testing protocol that could adequately screen pilots for the risk of subtle or sudden age-related incapacitation. *Ibid.* Second, although the FAA properly argued in the court of appeals that its expertise in matters of aviation safety is entitled to deference, the agency did not seek—and did not receive—deference for its argument that the ADEA does not apply to its safety-based determinations, such as the Age 60 Rule. See Gov't C.A. Br. 21-36; Pet. App. a7-a9.

[4] The court also concluded that the FAA's decision is not arbitrary and capricious because the rule applies to some types of pilots but not to others. Pet. App. a15-a21. Although the issue whether the FAA's decision is arbitrary or capricious is

4. Finally, petitioners err in contending (Pet. 23-26) that the decision of the court of appeals conflicts with the reasoning and outcome of decisions in other circuits. Petitioners concede (Pet. 23) that no court has ever held the Age 60 Rule to be invalid. That should end the matter, because this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Petitioners argue, nonetheless, that the reasoning of the court of appeals differs from that of other courts that have examined the Age 60 Rule in the context of age discrimination claims. They further maintain (Pet. 26) that the "disparate outcomes" in various cases involving age discrimination claims in the aviation industry suggest that more guidance from the Court in this area is necessary. Petitioners are mistaken.

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not "fairly included" in petitioners' "Questions Presented," Sup. Ct. R. 14.1(a), petitioners nonetheless discuss the allegedly inconsistent application of the rule in their petition. Pet. 21-22, 25.

As the court of appeals correctly concluded, the Age 60 Rule is not applied in an arbitrary or inconsistent manner. For example, the rule applies to cargo operations, but not to corporate aircraft, because federal law requires the highest safety standards for for-hire common carrier service to the public, irrespective of whether passengers are transported, and does not impose that requirement for other air transportation. Pet. App. a18-a19. Younger pilots with certain known medical conditions may be permitted to continue flying, provided that the condition can be assessed and monitored adequately; in contrast, "the subtler forms of physical and mental decline that may accompany aging often cannot be detected, let alone monitored or controlled." *Id.* at a18. Finally, the fact that some foreign pilots over age 60 may fly in U.S. airspace is a consequence of other provisions of federal aviation law and the government's treaty obligations. *Id.* at a20-a21.

As petitioners acknowledge (Pet. 10-11), the court of appeals decisions here and in *Coupé* are the first cases in which the FAA's Age 60 Rule has been challenged under the ADEA. As we have explained, the two decisions are fully compatible in both reasoning and outcome. In this case, the court held that the ADEA does not apply to the FAA in its role as safety regulator and, thus, it had no occasion to reach the BFOQ issue. In *Coupé*, the court held that the airline employer established a BFOQ defense by demonstrating that it is bound by the FAA's safety-based Age 60 Rule.

Other decisions cited by petitioners as conflicting with the reasoning and outcome of the decision of the court of appeals in this case did not pass on *the FAA's* Age 60 Rule at all. Rather, at issue in those cases were mandatory age requirements imposed as managerial decisions by the employer, often for jobs other than commercial pilots, the only positions covered by the Age 60 Rule. In *EEOC* v. *Boeing Co.*, 843 F.2d 1213 (9th Cir.), cert. denied, 488 U.S. 889 (1988), for example, an aircraft manufacturer failed at summary judgment to establish that a requirement it imposed on its own corporate pilots to retire at age 60 was a BFOQ. Although the court expressed some reservations about the FAA's Age 60 Rule in *dicta*, it acknowledged that the statutory standard underlying the rule "requires 'the highest possible degree of safety in the public interest' * * * and may be more hospitable to discrimination in the interests of safety than ADEA's standard for a BFOQ." *Id.* at 1220. The court also found that some of the tasks performed by corporate pilots are not as stressful and do not pose "as grave a safety risk" as the responsibilities of commercial pilots. *Id.* at 1221.

In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), the Court held that an airline's job transfer policy, which provided fewer "bumping" rights to pilots removed from their positions due to the Age 60 Rule than to pilots removed for other reasons, violated the ADEA. Because the Age 60 Rule itself was not challenged, however, the Court expressed no view on its lawfulness, noting only that the EEOC had not endorsed it as a BFOQ. *Id.* at 123 & n.17.

The fact that there have been different outcomes in cases involving different job categories and different employer-imposed age limitations is not particularly surprising. Compare, *e.g.*, *Williams* v. *Hughes Helicopters, Inc.*, 806 F.2d 1387 (9th Cir. 1986) (affirming jury verdict that upheld employer's age-based "stop flying" policy as a BFOQ for helicopter pilots) with *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) (reversing summary judgment ruling that employer's mandatory retirement age for corporate pilots was a BFOQ). Cf. also *EEOC* v. *American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995) (upholding, based on collateral estoppel, ruling that airline's policy against hiring flight officers too old to reach the rank of captain before age 60 is a BFOQ). Those decisions are not irreconcilable. More important, they have no bearing on the legal issue presented by this case—whether the ADEA limits the FAA in its role as safety regulator—a matter on which there is no conflict in the courts.

Finally, there is no conflict between the decision of the court of appeals here and the decisions in *Baker* v. *FAA*, 917 F.2d 318 (7th Cir. 1990), cert. denied, 499 U.S. 936 (1991), and *Aman* v. *FAA*, 856 F.2d 946 (7th Cir. 1988). Neither *Baker* nor *Aman*, which ruled on challenges to the FAA's denial of exemptions from

the Age 60 Rule, involved an ADEA claim. In any event, as explained in note 2, *supra*, the court in *Aman*, 856 F.2d at 954, found that "substantial evidence supported the FAA's conclusions" that no effective test existed to eliminate all incremental risk of "sudden incapacitation or undetected deterioration of skills among pilots over sixty." The court remanded to the FAA, however, for further consideration of the claim that "older pilots' edge in experience offsets any undetected physical losses." *Id.* at 957.

On remand, the FAA again denied the requested exemptions from the Age 60 Rule, and the matter returned to the court of appeals in *Baker*. Although the court of appeals was critical of the evidence presented by both sides, the court concluded that the FAA's decision was supported by substantial evidence and upheld the denial of the exemptions. 917 F.2d at 319-323. The court acknowledged that "crucial issues of public safety are at stake," but encouraged the FAA to continue to study the matter. *Id.* at 322. The FAA did precisely that, in commissioning the Hilton Study and examining all aspects of the Age 60 Rule in the 1995 proceeding that led to the decision in this case. Thus, *Aman* and *Baker* in no way conflict with the decision of the court of appeals here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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